H1B Visa Professionals

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H1B Visa Requirements
The H1B is a non-immigrant visa in the United States under the Immigration & Nationality Act, section 101(a)(15)(H). The H-1B nonimmigrant category is for foreign workers in "specialty occupations" and fashion models of "distinguished merit and ability." A "specialty occupation" is defined by the Immigration and Nationality Act (INA) as an occupation that requires:

? theoretical and practical application of a body of highly specialized knowledge; and
? attainment of a bachelor's or higher degree in the specific specialty (or its equivalent) as a minimum for entry into the occupation in the United States.

The H-1B classification is available, for a period not to exceed a total of six years, to a foreign worker:

- Who will be the incumbent in a temporary position. ("Temporary" is defined as that which is not permanent; or, that which is for a definite term as opposed to an indefinite term);
- Who will perform services in a specialty occupation. (Most professional jobs are classified as "specialty occupations"); and,
- On whose behalf the employer obtained an approved Labor Condition Application LCA. (A Labor Condition Application serves, amongst other things, to ensure that the employer is not paying less than prevailing wages).

Please note, the workers in this category may apply for permanent residency and do not need to maintain a foreign residence during their period of stay in the United States.

Availability of H1B Numbers

The annual H-1B cap is set at 65,000. The overall H-1B numbers are reduced by the U.S.-Chile and U.S.-Singapore Free Trade Agreements (FTAs), which set aside 6,800 H-1B numbers for workers from those two countries each fiscal year. Some unused FTA visas from a prior fiscal year may be recaptured and made available in the first six weeks of the following fiscal year.
In 2004 legislators created an exemption from the cap for 20,000 advanced degree graduates of U.S. universities. The USCIS will exempt the first 20,000 petitions for H-1B workers who

have a master's degree or higher from a U.S. institution of higher learning. After those 20,000 slots are filled, the USCIS will apply petitions for H-1B workers with a master's degree or higher against the annual cap of 65,000.

H1B Filing Procedure

Step One

Obtaining Prevailing Wage Determination
You must obtain a prevailing wage determination from an acceptable wage survey source or the local employment office that has jurisdiction over your geographical area of employment. After obtaining the prevailing wage for the offered position you must file an online LCA with Department of Labor.

Applying to the U.S. Department of Labor
An LCA is an application to the U.S. Department of Labor ("DOL"), whereby an employer assures the DOL that hiring a foreign worker would not be detrimental to similarly situated U.S. workers. If certified, the LCA will then be submitted to U.S. Citizenship and Immigration Services along with the petition for H-1B classification.

Step Two

Filing with the U.S. Citizenship and Immigration Services ("USCIS")
Filing with the USCIS entails submitting proof of your qualifications and proof that the offered job conforms to the criteria set in place. Additionally, you must submit certain forms describing the job and providing certain basic information about the foreign worker and the employer. Below, please find a list of forms and documents that must be included in the petition:

1. Signed and completed Form I-907 (if case filed under premium processing);
2. Signed and completed Form G-28;
3. Signed and completed Forms I-129, Supplement H, and I-129 H-1B Data Collection Supplement;
4. Signed and certified Labor Condition Application;
5. Copy of foreign worker?s latest I-94;
6. If foreign worker on F-1 status, copy of I-20 and evidence of employment authorization, if applicable;
7. If foreign worker on H or L status, copies of current and all prior H/L approval notices and current evidence of earnings (such as latest 3 pay stubs), if applicable;
8. If foreign worker on J-1 status, copies of IAP-66 and evidence of J-1 waiver or request for waiver;
9. Letter from the employer in support of the H-1 petition; and
10. Evidence of foreign worker?s qualifications (such as education evaluation, degree certificates, transcripts, experience letters and resume).

This is the last step in the H-1B classification process. On certain occasions USCIS may require further documentation to prove various elements of H-1B classification.

Employer?s Requirements

Maintaining Documentation

The LCA process requires that an employer maintain, in its office, a file containing documentation of various assertions that the employer will be making in the LCA application. For example, the prevailing wage determination that was obtained from an acceptable wage survey source or the local employment office must be kept in this file. Please note, you are not required to submit this documentation to the DOL, only to maintain it. The employer's failure to comply with these procedures could lead to, among other things, money penalties and a ban on the employer?s ability to hire other H-1B workers.

Complaints alleging misrepresentation of material facts in the LCA and/or failure to comply with terms of the LCA may be filed using the WH-4 Form with any office of the Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor. A list of Wage and Hour Division offices can be obtained at http://www.dol.gov.esa [2].

Compliance with I-9 Requirements

USCIS outlines how employers who hire H-1B aliens using the portability provisions comply with their I-9 requirements. Current regulations at 8 C.F.R. 274A.12(b)(20) authorize employment with the existing employer after a request for extension of H-1B status is filed. The alien in this case is employment-authorized, but the I-9 form contains no provision for this authorization. Employers should follow the documentation procedures they currently use for an extension of this sort. Typically, this could involve attaching a copy of the receipt notice for the filed petition along with a copy of the alien's I-94 to the I-9 kept on file.

Posting LCA at Client Site

If a job is not unionized, the employer must post two copies of "Notice of Filing of LCA? at each of the premises where the foreign employee will work. Please note:

- The notices must be posted no more than 30 days before the LCA is filed.
- The Notices are required to be posted in two conspicuous places (such as company notice boards)
- The Notices are further required to remain posted, and unobstructed for no less than 10 business days.

Benching Not Permitted

Please note that the employer will be required to pay the foreign worker the required wage for time in nonproductive status (bench time), unless the foreign worker requests time off for personal reasons.

LCA Attestations

The LCA contains several attestations that an employer is required by law to make before the DOL may certify the LCA. Those attestations are:

? The employer will pay the required wage rate to the H-1B workers employed pursuant to the LCA.

The required wage rate must be the greater of:

? the actual wage level paid by the employer to all other employees at the job site "with similar experience and qualifications for the specific employment in question," or
? the prevailing wage level for the occupation in the area of intended employment.

? The employer will offer the same benefits package on the same basis to similarly employed U.S. workers and H-1B workers. Eligibility and participation criteria must be the same for all workers. H-1B workers cannot be denied benefits because they are "temporary employees."

? The employment of H-1B workers will not adversely affect the working conditions of workers similarly employed in the area of intended employment.

? At the time of filing the LCA, there is no strike, lockout, or work stoppage in the course of a labor dispute in the occupational classification at the place of employment. If a strike or lockout occurs after the LCA is submitted, the employer will notify the DOL within three days of its occurrence and the LCA will not be used in support of H-1B petitions filed with the USCIS until the DOL determines that the strike or lockout has ceased.

? A copy of the LCA has been, or will be, provided to each H-1B worker employed pursuant to the LCA, and the employer has also provided notice of the filing of the LCA to the bargaining representative of the employer's employees in the occupational classification, or if there is no bargaining representative, the employer has physically posted notice of the filing of the LCA on the employer's premises.

However, please note, employers are permitted to pay discretionary bonuses to particular employees based on performance, technological skill, billable rate brought in, etc.

Placement of H-1 Workers at Sites Other Than Those Listed on the Original LCA

If the H-1B worker is placed at additional locations outside of one of the areas of intended employment listed on the original LCA, the general rule is that the employer must file a new LCA covering those new locations. The operative fact is whether the area of employment was listed on the original LCA, not whether an LCA has already been certified by that DOL region. The LCA rules require that the employer obtain a new prevailing wage determination for each new location and that a notice of the LCA filing be posted at each new location. The following exceptions to the general rule were established in December 2000: (1) travel for development activities, (2) travel to "non-worksite" locations, and (3) travel involving short-term work assignments. The detailed provisions governing the movement of H-1B personnel are discussed in below:

Additional Work Sites after the LCA is Certified

Worksite Within Areas Already Approved Requires New Posting Only

If the H-1B worker is placed at additional locations within one of the areas of intended employment listed on the original LCA, the only additional step that the employer must take is to post notice of the LCA at each new location on or before the day the H-1B worker begins

work at that location. This rule applies to trips of even one day to another work location within a listed area of employment.

Worksites Beyond Approved Areas Requires New LCA and H-1 Amendment

If the H-1B worker is placed at additional locations outside of one of the areas of intended employment listed on the original LCA, the general rule is that the employer must file a new LCA covering those new locations. The CIS also takes the view that an amended petition must be filed and approved whenever a new LCA is required.

Exceptions When a New LCA or H-1 Amendment Is Not Required

Some exceptions to the DOL general rule exist covering: (1) travel for development activities, (2) travel to "non-worksite" locations, and (3) travel involving short-term work assignments.

Exception - Developmental Activities

Travel related to employee developmental activities includes travel to attend management conferences, staff seminars, and formal training conferences (this exception does not apply if the H-1B employee is an instructor or resource who regularly performs such duties at specified locations).

Exception - Travel to Non-Worksite Locations

Travel to "non-worksite" locations includes travel that: (1) is part of the H-1B employee's job functions, i.e., the employee's work requires travel from location to location (referred to in the regulation as a "peripatetic worker"), or (2) is part of the worker's duties which require that the employee generally be at one location, but occasionally travel to other locations. The travel cannot exceed five consecutive workdays for a peripatetic worker, or ten consecutive workdays for any visit by a worker that spends most work time at one location and travels occasionally to other locations.

Examples of Travel to Non-Worksite Locations

- a computer engineer traveling to customer locations to troubleshoot complaints regarding software malfunctions

- a sales representative calling on prospective customers or established customers within a home office sales territory

- a manager monitoring the performance of out-stationed employees

- an auditor providing advice or conducting reviews at customer facilities

- a physical therapist providing services to patients in their homes within an area of employment

- an individual making a court appearance

- an individual lunching with a customer representative at a restaurant

- an individual conducting research at a library

Examples of Situations Not Covered by this Exception

- a computer engineer who works on projects or accounts at different locations for weeks or months at a time

- a sales representative assigned on a continuing basis in an area away from his/her home office

- an auditor who works for extended periods at the customer's offices

- a physical therapist who fills in for full-time employees of health care facilities for extended periods

- a physical therapist who works for a contractor whose business is to provide staffing on an as-needed basis at hospitals, nursing homes, or clinics.

Exception - Short Term Placements

Finally, the DOL rules provide that an employer may make a "short-term"' placement or assignment of an individual H-1B worker at any worksite or combination of worksites in a non-LCA area for a total of 30 workdays in a one-year period. The placement may be expanded by an additional 30 workdays (60 workdays in a one-year period) if the employer is able to show that the worker maintains a workstation at the home office, spends a substantial amount of time at the home office, and maintains a "place of abode" in the area of the home office. Either the calendar year or the employer's fiscal year may be used. Note that the 30/60 day limitation does not set an outer limit on the amount of time that the employee can be away from the home worksite; it is a limit on the number of days that the worker can enter a specific area of employment for work purposes in a one-year period, and a separate 30/60 day limit applies to each different specific area of employment. Once an H-1B worker exceeds the workday limitation in a one-year period, the employer would not be permitted to continue the placement of that worker or any other H-1B worker in the same occupation in that area of employment, until one year from the beginning of the next one-year period or until an LCA is in place.

To clarify, a worker who is home-sited in New York can go to Philadelphia for 30 days and also go to Minneapolis for 30 days without an LCA being on file to cover his/her occupation in either area. On the other hand, the same worker cannot go to St. Paul to work after she has been in Minneapolis for thirty days, because St. Paul is in the same area of employment (usually, anyplace within an area of normal commuting distance). An LCA would have to be filed to cover the Minneapolis-St. Paul area before any worker in the same occupation could return to work in that area. As just illustrated, once an H-1B worker exceeds the workday limitation in a one-year period, the employer would not be permitted to continue the placement of that worker or any other H-1B worker in the same occupation in that area of employment, until one year from the beginning of the next one-year period or until an LCA is in place.

Keep in mind that the DOL will allow an employer to transfer an employee to a new location outside the area of employment listed on the original LCA if the employer already has an LCA approved in the new area of intended employment for other H-1B workers employed in the same position. The DOL will follow this policy even if all slots listed in of the LCA covering the

new location have been used for employment of other H-1B workers. In the latter cases, however, the employer will need to file an LCA after the transfer to rectify the "overcrowding" situation. Presumably, the employer will also need to file an amended petition with the USCIS (because a new LCA is being filed). The short-term placement exception cannot be used in an area in which the employer has a valid LCA on file for that occupation. As a result, the employer will need to use a slot available in the LCA for that area of employment and, if all slots have already been used, the employer will need to file an additional LCA to rectify the "overcrowding" problem.

Also, remember that the employer must reimburse the employee for all costs related to business travel since such expenses are considered part of the employer's business expenses.

Dismissal Requirements

Lastly, under the regulations, if an employer were to dismiss the foreign worker during H-1B classification status, the employer could be liable to pay the return fare to the foreign worker?s last place of foreign residence. Please note that this liability continues only during the H-1B status. Change of status to permanent residence or any other status, absolves the employer of this liability.

H1B Extensions

The maximum period of validity of the initial H-1B petition is three years and it often becomes necessary to obtain extensions of stay. Extensions of stay for up to three additional years can be obtained. To obtain an extension of stay, the employer or its representative must submit an application to the USCIS on forms I-129, H Supplement and I-129 H-1B Data Collection Supplement, the same forms used for the initial H-1B petition. Please note that supporting documentation must be resubmitted because USCIS will not go back and retrieve information/documentation from the initial H-1B petition.

Extensions Beyond the Six-Year Maximum Period of H-1B Stay are Possible in Limited Circumstances

The regulations allow an extension beyond the six-year limit. One-year extensions are permitted if a labor certification application has been filed and is pending for at least 365 days; and three-year extensions are permitted if an I-140 has been approved on behalf of the beneficiary. Extensions are permitted until a decision is made on the immigrant visa application or petition.

H1B Transfers

When an H-1B foreign worker would like to change employers and continue to maintain his or her current H-1B status, an I-129 petition must be submitted to USCIS by the new employer or its representative. The forms in this case will be treated as a new petition, and will require the appropriate filing fees. Please note that when the H-1B foreign worker changes H-1B employers, no action is required on behalf of H-4 family members because the H-4 dependent continues to remain in a valid nonimmigrant status. H-4 nonimmigrant classification is not employer-specific, family members remain in valid status even if the H-1B foreign worker changes employer.

Visa Renewals

An H-1B foreign worker's visa is normally issued for the period of validity of the approved H-1B petition. In some instances, the visa may be issued for a shorter period of time. In either case, the H-1B foreign worker is likely to need a renewal of his or her visa if he or she will remain in the U.S. up to the six-year maximum period of eligible stay. If the H-1B foreign worker never leaves the U.S. during the six-year period, a new visa is not required. However, if the foreign worker needs to travel abroad after expiration of his or her original H-1B visa, a new visa must be obtained in order for the H-1B foreign worker to reenter the U.S.

The process for obtaining renewal of a nonimmigrant visa is no different than the procedure for initial visa issuance. The foreign worker can go to the U.S. consulate (preferably the one that issued the original visa) and present documentation. While it is preferable that the foreign worker return to the consular post which issued the original visa to reapply for a new visa, he or she may also apply for a new visa at a U.S. consulate in a third country, such as Canada or Mexico, provided that the foreign worker is able to obtain a visa to enter the third country. Note that visa issuance may take as long as six to eight weeks; most cases will be processed to completion in less time, but in some instances, security clearances may take longer than the stated eight-week period.

Please note, the State Department stopped accepting applications for domestic visa revalidation on July 17, 2004. The domestic revalidation program was suspended because of increased interview requirements for nonimmigrants, as well as the requirement that visas issued after October 26, 2004, contain biometric identifiers (fingerprints and facial scans).

H-4 Classification

Family members of the H-1B foreign worker are admitted to the United States in the H-4 category. Qualifying family members include only the spouse and unmarried children under 21 years old. H-4 dependents are admitted for the same period of time for which the H-1B foreign worker is admitted. H-4 dependents may alternatively be admitted in other nonimmigrant categories for which they qualify. H-4 dependents may undertake studies while remaining in the H-4 category, however, they may not engage in any form of employment.

Premium Processing

For H-1B cases filed under premium processing, USCIS will issue an approval notice, notice of intent to deny, request for evidence, or notice of investigation for fraud or misrepresentation within 15 calendar days. It is expected that in the event there is a request for evidence, notice of intent to deny, or notice of investigation, the Service will have an additional 15 days to adjudicate the case once the requested information or response is received. Premium processing begins the day USCIS physically receives the petition or application and ends the day that Service "issues and serves on the petitioner or applicant" a notice or request. If an application or petition is not eligible for premium processing, the fee will be refunded and the case will be processed under regular circumstances.

H1B for Nurses

Click here [3] for more information about H-1B for nurses.

Nonimmigrant Visas:
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Links:
[1] https://immigration.com/visa/h-1-visa/h-1-visa-professionals
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